

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: March 25, 2003
Paper No. 24
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Food Venture Capital Group, Ltd.

Serial Nos. 75/573,201 and 75/573,203

Christine Haight Farley and David B. Goldstein of
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C. for
Food Venture Capital Group, Ltd.

Michael L. Engel, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Hairston, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Food Venture Capital Group, Ltd. has filed two
applications to register the marks SERAFINA ON THE RUN and
SERAFINA for "restaurant services." Both applications were
filed on October 20, 1998, based on a bona fide intention
to use the marks in commerce.

The Trademark Examining Attorney has finally refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the stylized mark SERAFINI'S, shown below and previously registered for restaurant services,¹ that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.



Applicant has appealed in each application. In both appeals, applicant and the Examining Attorney have filed main briefs, and applicant filed a reply brief. Oral hearings were not requested. Because both appeals present the same issue and similar facts, we have considered the appeals together and issue a single opinion. We affirm the refusal to register in each application.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of

¹ Registration No. 1,112,499 issued January 30, 1979; renewed for a period of ten years from May 13, 1999.

confusion issue. See *In re E. I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The services set forth in applicant's two applications are identical to those set forth in the cited registration. Applicant argues that there are differences in the nature of applicant's and registrant's restaurant services and their geographic locations. According to applicant, its restaurant is "upscale" in nature and located in New York City, whereas registrant operates a restaurant and catering service in Erie, Pennsylvania. These purported differences are immaterial to our determination of likelihood of confusion because neither the applications nor the cited registration contain any such limitations to the recitations of services. It is well settled that "[t]he question of likelihood of confusion must be determined based on analysis of the mark as applied to the goods and/or services recited in an applicant's application vis-

à-vis the goods and/or services in [the] registration, rather than on what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Moreover, neither applicant's nor registrant's recitation of services contains any limitations as to channels of trade or classes of customers. Thus, we must presume that the services of applicant and registrant are offered in all of the normal channels of trade to all of the usual customers of restaurant services. See Canadian Imperial Bank v. Wells Fargo, *supra*. In other words, we conclude that the channels of trade and class of customers of applicant's and registrant's services are the same.

Turning to the marks, we note, "When marks appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The Examining Attorney contends that SERAFINA is the dominant portion of each of applicant's marks; that the phrase ON THE RUN in application Serial No. 75/573,201 simply conveys that applicant's services are designed for people on the go and thus has little source-indicating

significance; and that SERAFINA and SERIFINI'S are substantially similar in sound, appearance, connotation and overall commercial impression.

Applicant, in urging reversal of the refusals to register, contends that the marks must be viewed in their entirety; that the Examining Attorney has improperly dissected its SERAFINA ON THE RUN mark; that the marks are further distinguished by the stylized format of the registered mark; and that there is no evidence that registrant's mark is famous. Moreover, applicant contends that the registered mark, SERAFINI'S, is likely to be understood by consumers as a surname; whereas, SERAFINA is likely to be understood as the name of a Biblical angel. In support of its position, applicant submitted an excerpt purportedly from The Oxford English Dictionary of "seraphim" and four declarations of residents of New York City.²

² These declarations indicate the opinions of the declarants regarding likelihood of confusion, which is immaterial to our determination. In addition, they indicate the declarants' opinion regarding the connotations of "Serafini" and "Serafina."

Our consideration of the marks is based on whether each of applicant's marks and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See, *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.³

³ As the Examining Attorney correctly points out, the mere fact that the word SERAFINA in applicant's marks is not identical to the word SERAFINI'S in registrant's mark does not render this principle inapposite.

Considering applicant's marks, SERAFINA is the entirety of one of applicant's mark and the other mark consists of SERAFINA ON THE RUN. The phrase ON THE RUN is highly suggestive of restaurant services connoting that the services are for persons with a busy life style, i.e., "on the run." Thus, we agree with the Examining Attorney that the phrase ON THE RUN has little source-indicating significance. In view thereof, and because SERAFINA is the first word in the mark, it is likely to be perceived as the dominant portion of the mark.

We recognize that registrant's mark is depicted in stylized letters and in the possessive form. It further differs from the word SERAFINA in applicant's marks in the final vowel. However, we find these differences to be inconsequential. Rather, we are persuaded that SERAFINA in each of applicant's marks is substantially similar in appearance and sound to the word SERAFINI because it differs by only the final letter.⁴ Regarding the

⁴ When pronounced, the possessive "SERAFINI'S" is no different from the plural "SERAFINIS." Those who hear the involved marks SERAFINI'S and SERAFINA, whether from word-of-mouth recommendations, radio, or television, will likely think SERAFINI'S is a possessive or plural form of SERAFINA. The Board has held that the pluralization of a mark is generally not significant. In re Pix of America, Inc., 225 USPQ 691 (TTAB 1985). Likewise, we do not find any great distinction between a word and its possessive form.

connotation of the marks, neither the few declarations nor the dictionary excerpt defining "seraphim" establish that

SERAFINA means seraphim or angel. Indeed, while dictionaries we have referenced include listings of seraph and seraphim, none includes serafina or serafin. In short, the record does not support applicant's contention, in essence, that SERAFINA would be viewed as a variant of "seraph" or "seraphim." We believe it is more likely to be perceived as a name, either a given name or a surname.

Likewise, we believe the connotation of the registered mark is that of a name, especially because the mark is set forth in the possessive form. Thus we find the connotations of SERAFINA and SERAFINI'S very similar; and the connotation of SERAFINA in SERAFINA ON THE RUN, while perhaps a double entendre (SERAFINA, as a person, "on the run" and SERAFINA restaurant services for patrons "on the run") remains that of a name.

Given the fallibility of consumers' memories and the fact that they are unlikely to encounter the marks at the same time or side-by-side, we find that applicant's two marks and registrant's mark, considered in their entirety, are substantially similar in overall commercial impression.

Finally, with respect to applicant's contention that there is no evidence that registrant's mark is famous, the absence of such evidence is of no consequence. This type of evidence would not normally be of record in an ex parte case and the lack of such evidence does not indicate that there is no likelihood of confusion. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). ("Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark's not being famous.").

We find that in view of the substantial similarity in the commercial impressions of applicant's marks, SERAFINA and SERAFINA ON THE RUN, and registrant's stylized mark, SERAFINI'S, their contemporaneous use in connection with the identical services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

Decision: The refusal to register in each application is affirmed.